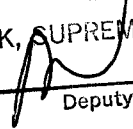


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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

Case No. 76,526

JANET W. SPOHR,

Petitioner,

vs.

DISTRICT COURT OF APPEAL  
4th District - No. 89-1766

ANNA M. SPOHR, WILLIAM E. SPOHR,  
JR., JOAN A. GARDNER and JOHN C.  
BERRYMAN as Personal Representative  
of the Estate of William E. Spohr,

Respondents.

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**RESPONDENTS' ANSWER BRIEF ON THE MERITS**

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PREFACE

The symbol (R- \_\_\_\_\_) refers to the Record on Appeal. The Petitioner's Appendix is referred to as (P.App.- \_\_\_\_\_). The Respondent's Appendix is referred to as (R.App.- \_\_\_\_\_).

STATEMENT OF CASE AND FACTS

This statement of the case and facts is included to set forth facts not contained in the Petitioner's Statement of Case and Facts.

William E. Spohr died September 10, 1986. Testamentary instruments were admitted to probate on December 5, 1986. The first publication of the Notice of Administration was on January 9, 1987, thereby requiring any claims pursuant to F.S. §733.702 (1987) to be filed no later than April 9, 1987. (P.App.-C)

On April 7, 1987, within the non-claim period, Respondents filed a Complaint in Circuit Court in Palm Beach County. (P.App.-E). The Complaint asserted a cause of action based upon a marital settlement agreement entered into between decedent and his former wife in 1956. The complaint included all information essential to assert a claim against an estate. Timeliness of the complaint is not an issue in this appeal. The settlement agreement, which was incorporated into a divorce decree,

obligated decedent to devise to his former wife and children a portion of his estate amounting to not less than one-half the value of his entire estate. The testamentary instruments admitted to probate breached the settlement agreement and left nothing to the former spouse and children. (P.App.-E).

The Personal Representative of the estate waived service of the Summons and Complaint. The waiver is reflected in the record (R.App.-A). Petitioner, decedent's surviving spouse, intervened (R-78) and moved for summary judgment. (R-117). The trial court, in a two-step process, held that F.S. §733.702 (1987) required Respondents to file a claim against the estate by filing a Statement of Claim with the clerk of the probate division of the Circuit Court. Next, the trial court held that the timely filing of Respondents' civil Complaint did not satisfy the statutory requirement of presenting a claim in the proper manner. Summary Judgment was entered in favor of Petitioner (P.App.-H).

Respondents filed an appeal to the Fourth District Court of Appeal to review the trial court's order (R-227-228). On July 18, 1990, the Fourth District Court of Appeal reversed the order of the trial court (P.App.-I). The district court held that the trial court's initial conclusion -- the applicability of F.S. §733.702 -- was erroneous because the trial court relied upon two older cases which construed a predecessor statute to §733.702 (1987). The predecessor statute, §733.16 (1973), did not limit its applicability to claims arising before a decedent's death. The controlling statute, §733.702 (1987), only applies to claims

arising before a decedent's death. On that basis, it was error for the trial court to rely upon cases interpreting a statute which was supplanted by the present statute. The first step of the conclusion, the inapplicability of §733.702 to this case, made the second step moot. Thus, the issue of whether the complaint filed in the trial court satisfied the literal requirements of the non-claim statute was not addressed by the district court. (P.App.-I)

Petitioner's Notice to Invoke Discretionary Jurisdiction of this court was timely filed on August 16, 1990. On January 18, 1991, this court accepted jurisdiction (P.App.-J).

#### SUMMARY OF ARGUMENT

The non-claim statute applicable to this case, §733.702 (1987), is restricted to claims which arise before a decedent's death. Petitioner relies upon cases interpreting an earlier version of the non-claim statute. The district court justifiably distinguished those cases. The claim here did not arise until after decedent's death and on that basis, the district court opinion was correct in holding that §733.702 (1987), did not govern this case.

The Respondents did not waive argument as to the threshold issue of the applicability of §733.702, since that issue was argued prior to the summary judgment hearing in the trial court, is reflected in the record on appeal, and is discussed in Respondents' brief before the Fourth District Court of Appeal.

The filing of a Complaint in the civil division of the

Circuit Court meets every requirement of "presenting a claim" within the meaning of §733.702 and §733.703. There are no statutes or cases which prescribe a particular form for "presenting a claim" in a decedent's estate. There are no statutes or cases which require that a claim be filed in a particular form with a particular division of the Circuit Court in order to constitute "presenting a claim".

Petitioner is estopped from raising the bar of §733.702, because the attorney for the personal representative waived service of the complaint.

Public policy would best be served if this court holds that a complaint timely filed within the non-claim period is the equivalent of presenting a claim in a probate proceeding.

#### ARGUMENT

- I. THE DISTRICT COURT PROPERLY HELD THAT DECEDENT'S FAILURE TO DEVISE PROPERTY TO HIS FORMER SPOUSE AND CHILDREN DID NOT GIVE RISE TO A COGNIZABLE CLAIM UNTIL AFTER DECEDENT'S DEATH.

The district court interpreted §733.702 (1987) correctly when it ruled that Respondent's right against decedent's estate did not arise before death. On that basis, the district court held that the instant case does not fall within the ambit of the non-claim provisions of the Probate Code. As used in the statute, the word "before" must be given its common ordinary meaning, namely prior in time. Decedent's death and the subsequent admission of his testamentary instruments to probate gave rise to Respondent's



cause of action. Those events occurred after, not before death.

The district court relied upon the difference between the language of the statute governing this case, §733.702 (1987), and the language of the predecessor non-claim statute, §733.16 (1973). The predecessor statute, entitled "Form and Manner of Presenting Claims; Limitation", although similar to the present statute, contains a difference critical to this case. The predecessor provides as follows:

(1) No claim or demand, whether due or not, direct or contingent, liquidated or unliquidated, or claim for personal property in the possession of the personal representative or for damages, including but not limited to actions founded upon fraud or other wrongful act or commission of the decedent, shall be valid or binding upon an estate, or upon the personal representative thereof, or upon any heir, legatee or devisee of the decedent unless the same shall be in writing . . . . Any such claim or demand not so filed within six months from the time of the first publication of the notice to creditors shall be void even though the personal representative has recognized such claim or demand by paying a portion thereof or interest thereon or otherwise; and no cause of action, at law or in equity, heretofore or hereafter accruing, including but not limited to actions founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom such claim may be made, whether suit be pending at the time of the death of such person or not, unless such claim be filed in the manner and within the said six months as aforesaid. (Emphasis added).

\* \* \*

The important distinction between the two statutes is that §733.16 (1973) applies to claims or causes of action which accrue "heretofore or hereafter . . . ." with death as the measuring time. In contrast, §733.702 (1987) is limited to claims or causes of

action which accrue "heretofore", but does not apply to causes of action which accrue "hereafter".

Although it might appear, at first blush, that use of the language "heretofore or hereafter accruing" in the prior statute versus the language "before" in the current statute is a facile distinction, the legislature apparently recognized the difference. The current statute contains a narrow exception for one category of claims, funeral and burial expenses, which arise after death. The prior statute did not contain the exception.

Funeral and burial expenses are both clearly post-death expenses. Absent the specific inclusionary language in the present statute, funeral and burial expenses would not fall under the scope of the non-claim statute. On the other hand, those expenses would arguably have been included in the "heretofore or hereafter" language of the prior statute, §733.16 (1973).

Had the legislature intended that causes of action such as the one presented in this case be covered by the non-claim statute, it would have specifically so provided, as it did in the case of funeral and burial expenses. The legislature did not do so. Therefore, according to the principle of statutory construction, "expressio unius est exclusio alterius", causes of action which arise after decedent's death do not fall within the non-claim statute. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). See, In Re: Estate of Kulow, 439 So.2d 280 (Fla. 2d DCA 1983). Having established that the present and predecessor statutes embody a critical difference, it is clear the district

court was correct when it distinguished prior decisions of this court.

The crux of Petitioner's criticism of the district court opinion is her position that:

. . . claims within section 733.702 (1987) are not merely those claims that arise before a decedent's death, as the District Court suggests, but there are numerous other categories as well . . . . (Petitioner's brief at page 9).

Petitioner's position is not supported by the ordinary meaning of the statutory language.

The Florida Probate Code was adopted in large part from the Uniform Probate Code. In Re: Estate of Kulow, 439 So.2d 280 (Fla. 2d DCA 1983). The provisions of the non-claim sections of the Uniform and Florida Codes differ significantly in their approach. The district court in Kulow recognized the difference; its analysis is instructive and implies that the Florida legislature rejected the Uniform Code approach.

The court in Kulow contrasted the provision of the Uniform Code with that of Florida. Section 3-803(b) of the Uniform Code provided:

(b) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative, within four months

after performance by the personal representative is due;

(2) any other claim, within 4 months after it arises. (Emphasis added).

The court recognized that large parts of the Uniform Code were adopted as part of the Florida Code. It reasoned, however, that since the Florida legislature rejected the non-claim portion of the Uniform Code, the rejection was significant.

As analyzed in Kulow, supra, the Uniform Code required that claims "... which arise at or after ..." death are covered by the provision. However, the Florida provision, which applies to this case, limits coverage to claims which arise before death.

According to the rationale of Kulow, the claim in that case would have been covered by the "at or after" language of the Uniform Code because the claim arose after death. On that basis, the "before" language of the Florida Code excluded the cause of action from the non-claim statute.

The analysis in Kulow clearly demonstrates that Petitioner's position set forth hereinabove, is erroneous. The legislature used the words "before" death and rejected the "at or after" death language of the Uniform Code. It is clear that the legislature intended to exclude claims from the non-claim statute which arise at the precise moment of death, or arise after death.

Respondent's claim did not arise until after death, or, at best, it arose as of the moment of death when decedent could no longer revise his testamentary instruments. The legislature did

not intend to cover the cause of action presented here in the non-claim statute and the Fourth District's opinion is correct and should be sustained.

II. THE FOURTH DISTRICT PROPERLY CONSIDERED THE THRESHOLD ISSUE OF THE APPLICABILITY OF F.S. §733.702 (1987).

The issue as to the threshold applicability of §733.702 (1987) is preserved in the record on appeal and was thus properly considered by the Fourth District. As noted by the district court, the trial court decided the case in a two-step process. The first step was the crucial and threshold issue of the applicability of §733.702. That issue was fully briefed and argued in the trial court. Moreover, the issue was noted in Respondents' brief before the district court, at Page 12.

The district court is not prohibited from basing its decision upon a ground presented in the record, but which was not the primary issue presented in the legal briefs. The district court's scope of review encompasses all those matters which have been preserved by the appellant in connection with the proceeding in the trial court and presented to the appellate court by the record on appeal. The scope of review is not otherwise limited. Maistrosky v. Harvey, 133 So.2d 103 (Fla. 2d DCA 1961). It is the responsibility of the appellant to bring to the reviewing court a trial record containing every phase of the trial proceeding that must necessarily be considered to establish prejudicial error. Firkel v. Firkel, 391 So.2d 351 (Fla. 3d DCA 1980).

The district court simply reconsidered the trial court's two-step decision. Once it reached the threshold issue, the applicability of §733.702, and found the statute inapplicable to the facts before it, it was not necessary for the court to decide whether the complaint filed in the trial court satisfied the literal terms of the non-claim statute.

III. THE COMPLAINT FILED IN THE CIVIL DIVISION OF THE CIRCUIT COURT SATISFIES THE REQUIREMENTS OF "PRESENTING" A CLAIM PURSUANT TO F.S. §733.702 AND §733.703.

The question presented is not whether a complaint filed in the civil division of the circuit court can substitute for presentment of a claim in all instances. Rather, the question is whether the complaint as filed satisfies every statutory condition in order to constitute a claim for purposes of §733.703. The complaint filed with the circuit court in fact satisfied each individual statutory requirement. If filing a timely complaint satisfies all requirements of the statute, then it must be deemed proper.

The district court did not address Respondents' argument to the effect that the complaint satisfied the requirements of the non-claim statute. Every district court which has addressed the question has held directly, or stated in dictum that a timely filed complaint (or other paper) which contains the information required by the non-claim statute will satisfy the statute. A contrary ruling would impose restrictions on estate creditors not included in the non-claim statute.

A. Statutes and the Florida Constitution.

The initial question for determination is whether the complaint filed in the civil division of the circuit court constituted filing a claim within the meaning of F. S. §733.703 (1987). In relevant part, §733.703 (1987) provided:

1. A written statement of the claim shall be filed with the clerk.
2. The statement must include the name and address of the claimant, or his attorney or agent, the basis for the claim and the amount.
3. The claim is presented when filed.

The foregoing constitute the only statutory rules pertaining to what a claim is, where it must be filed and what information the claim must include. It necessarily follows that these are the only standards for evaluating the sufficiency of Respondent's complaint.

Section 731.201 of the Probate Code provides general definitions which are essential to any interpretation of the claims statute, §733.703. Pertinent definitions within §731.201 provide:

- (5) "Clerk" means the clerk or deputy clerk of the court.
- (6) "Court" means the circuit court.
- (14) "File" means to file with the court or clerk.

The above definitions are the only relevant definitions in the Probate Code with respect to §733.702, as they bear upon the method and manner of presenting claims against decedents' estates.

A review of the Probate Code definitions, the non-claim procedure of §733.703, and the Florida Constitution readily demonstrates that the filing of a complaint with the clerk of the circuit court falls within the definition of §733.703, the form and manner of presenting claims. It is also critical that the probate code, §731.201(14), defines "filing" to mean only filing with the clerk or the court. "Filing" does not mean there is an additional requirement that the document must also be served within the non-claim period.

Article V, Section 5 of the Florida Constitution grants original probate jurisdiction to circuit courts. The Constitution does not in any way limit probate jurisdiction other than to the circuit courts. In other words, the Constitution does not recognize informal divisions, established for administrative convenience, within the circuit courts.

There is no statutory or legal requirement that a claim be filed with the probate division of the circuit court, as opposed to any other division of the circuit court. No legal significance attaches to the internal operation of the court system, or the assignment of judges to different divisions within the circuit court. All circuit court judges have the same jurisdiction within their respective circuits. In Re: Peterson, 364 So.2d 98, 99 (Fla. 4th DCA 1978).

Respondent cites Douglass v. McRaney, 137 So. 157 (Fla. 1931) and Jones v. Allen, 184 So. 651 (Fla. 1938) for the proposition that, under the pre-1945 non-claim statute, the filing



of an action in circuit court against the personal representative did not constitute "presentment" of a claim under the statute. However, those cases were decided at a time when exclusive jurisdiction of probate claims resided with the office of the county judge granting letters of administration and not, as now, with the circuit court. Art. V, §5, Fla. Const.; 184 So. at 652. Therefore, Douglass and Jones have no significance as to whether a claim may properly be presented in the form of a complaint in the circuit court in this case.

Respondent has cited a footnote in Crosson v. Conlee, 745 F.2d 896, 901 (4th Cir. 1984). The footnote, as is clear from the text of the opinion, is based upon an erroneous reading of Florida law as it applied to the Crosson case and also as applied to the current case. The Crosson court neglected to mention that exclusive probate jurisdiction was vested in the county judges court until 1973, when circuit courts were given exclusive jurisdiction over probate matters. Once probate jurisdiction was vested in the circuit courts, there was no longer any need for an exception to the non-claim procedure which authorized a complaint in circuit court as an alternative to pursuing a remedy in the judges court.

Crosson also misinterprets Florida law in another respect. The federal court says there is a requirement that a claim be presented to the "probate clerk". Crosson, supra, at 901. There is not such requirement. The Crosson decision should be disregarded.

B. Timely filing of the complaint in the court satisfies the requirements of presentment of a claim.

The four District Courts of Appeal which have considered the question presented here have either held (in the case of the First, Second and Fifth Districts) or stated in dicta (in the case of the Fourth District) that commencing a lawsuit by filing a complaint satisfies the requirements of the Florida Probate Code.

Those courts have all rendered decisions which do not differentiate between the filing of a complaint and the filing of a claim, so long as the filing itself takes place within the applicable non-claim period.

The Fourth District recognized in Koschmeder v. Griffin, 386 So.2d 625, 627, n.1 (Fla. 4th DCA 1980) that a civil action filed within the three-month non-claim period is the equivalent of filing a claim. The First District, in Steigman v. Danese, 502 So.2d 463, 470, rev. den., 511 So.2d 998, relied upon Koschmeder's inference that filing a civil action within the time constraints of §733.702 satisfied the filing requirements of §733.703. Steigman held that a suit filed and service of process effected within the three-month statutory period met the time constraints of §733.702.<sup>1</sup> Importantly, the plaintiff in Steigman did not file a "claim" with the probate division of the circuit court, despite pendency of a probate proceeding.

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<sup>1</sup> The Steigman court appeared to attach significance to service of process having been effected within the three-month period. That statement is dictum. §733.703 provides that a "claim is presented when filed."

The complaint which forms the basis of this proceeding in the trial court satisfies each and every requirement of the Probate Code for presenting claims. As required by §733.703, the complaint was timely filed with the clerk of the circuit court. The trial court did not hold that the complaint omitted information required by §733.703.

Florida courts do not adopt the hyper-technical statutory interpretation which Petitioner would have this court adopt. Rather, the only appellate courts (First and Second Districts) which have squarely addressed the question presented by this appeal have ruled that a complaint filed with the clerk of the circuit court, which otherwise contains information required by §733.703, is sufficient to meet all statutory requirements.

The First District found that the filing of a complaint satisfied the non-claim statute in Coley v. Estate of Odom, 500 So.2d 188, 190 (Fla. 1st DCA 1986), rev. den. 506 So.2d 1040 (Fla. 1987). There, the only "claim" ever filed by one of the appellants was a wrongful death action. Yet, on appeal, there was no allegation that the action failed to meet the statutory requirements of presenting a claim. The only issue was the timeliness of the claim, and not whether the claim had been "presented". See, also, American Telephone & Telegraph Company v. Fraiser, 545 So.2d 405 (Fla. 1st DCA 1989), in which the district court affirmed the trial court's dismissal of a complaint against an estate. Again, the only issue was whether the complaint was timely within the limits of §733.702(1)(a). There was no issue as

to the sufficiency of the complaint, filed in the circuit court.

The Second District held in Notar v. State Farm Mutual Automobile Insurance Company, 438 So.2d 531, 533 (Fla. 2d DCA 1983), that a motion for substitution of parties and appointment of personal representative could be considered "presentment" of a claim. The court reached its conclusion despite the fact that the "claim" was cast in the form of a motion to substitute parties and despite the fact that the pleading was not filed with the probate division of the circuit court. There, the applicable non-claim period was the three-year non-claim period under §733.702(1)(b). The court found that the motion for substitution stated the basis of Notar's claim sufficiently to satisfy the statutory requirements of §733.703 that a creditor file a written statement of the claim stating its basis and the amount claimed. The Notar court also held that plaintiff's petition for probate administration constituted a separate, independent "claim" within the meaning of Fla. Stat. §733.702.

According to Notar, the only relevant inquiry is whether a document has been timely filed (not served) with the circuit court (without regard to the court's internal divisions) and whether the document states the basis for the claim. Fla. Stat. §733.702 and §733.703 do not require anything more.

The Fifth District, in Olenick v. Bennett, 537 So.2d 160 (Fla. 5th DCA 1989) reversed the trial court's dismissal of a complaint under §733.702, when the complaint was timely filed and the attorney for the estate had accepted service of the complaint.

Again, the court held that it was not necessary that a specific claim under §733.702 be filed in the probate division.

C. The estate is estopped from raising the bar of the non-claim statute.

Olenick, supra, raised the additional issue of estoppel, which is present in the instant case as well. In holding that fairness and equity dictated that the estate was estopped from raising the statute as a defense, the Olenick court relied upon this court's holding in Barnett Bank v. Estate of Read, 493 So.2d 447 (Fla. 1986). In Barnett Bank, this court determined that the non-claim statute is not a jurisdictional statute, but a statute of limitation. Therefore, the estate could waive or be estopped from asserting the bar of §733.702. Olenick is directly on point and controls this appeal.

Although Petitioner has scrupulously avoided the issue, counsel for the Personal Representative waived and agreed to accept service of the complaint in the instant case. (R.App.-A). As in Olenick, the waiver and acceptance created an estoppel. (R.App.-A). The principles of equity and fairness which applied in Olenick to estop the estate from asserting a statute of limitation should be equally applicable in the instant case.

#### IV. TREATING THE FILING OF A COMPLAINT AS PRESENTING A CLAIM IS CONSISTENT WITH PUBLIC POLICY.

This court has articulated the public policy supporting statutes of non-claim. In Re: Brown's Estate, 117 So.2d 478, 480

(Fla. 1960). The policy is not to unreasonably restrict the rights of creditors. Rather, the policy is to expedite and facilitate settlement of estates. A holding that Respondents' complaint, timely filed within the non-claim period, meets the requirements of presenting a claim in a probate proceeding does not frustrate or run afoul of the policy. Filing a complaint does not cause surprise, delay or inequity. Most importantly, filing a complaint satisfies the literal terms of the non-claim statute. Requirements that a claim be filed using a particular form and in a particular division of the circuit court, as urged by Petitioner, would ignore clear precedent and the unambiguous language of the non-claim statute. Petitioner's arguments, if accepted by the court, would impose a filing duty upon creditors of estates with no statutory basis at all.

Moreover, the personal representative has the obligation, pursuant to Fla. R. P. & G. P. 5.065, to file notice with the probate proceedings of civil actions filed against the personal representative. In the case of a claim filed with the clerk, a copy of the claim is mailed to the attorney for the personal representative. Fla. R. P. & G. P. 5.490(c). This procedure affords no wider scope of notice to interested persons than when a civil action is filed. Therefore, under either procedure, interested persons are put on notice of claims or actions. They subsequently have the opportunity to intervene in an action or object to a claim.

In fact, Petitioner elected to intervene and participate

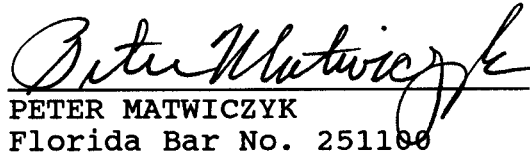
in the circuit court action in the instant case. (R-78). This refutes Petitioner's argument that interested persons will be prejudiced if a timely-filed complaint is equivalent to presentment of a claim.

**CONCLUSION**

For the foregoing reasons, the decision of the Fourth District Court of Appeal should be affirmed.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail, to Freeman W. Barner, Jr., Esq., Post Office Box 14036, North Palm Beach, FL 33408 and to Leonard J. Adler, Esq., 777 South Flagler Drive, Suite 310 East, West Palm Beach, FL 33401, this 4 day of March, 1991.

  
PETER MATWICZYK